


by hand to the offices of the addressee.

(XX) STATE. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(XX) FEDERAL. I declare that I am employed in the office of a member of the Bar of this court at whose discretion the service was made.

Dated this 14th day of February, 1994.

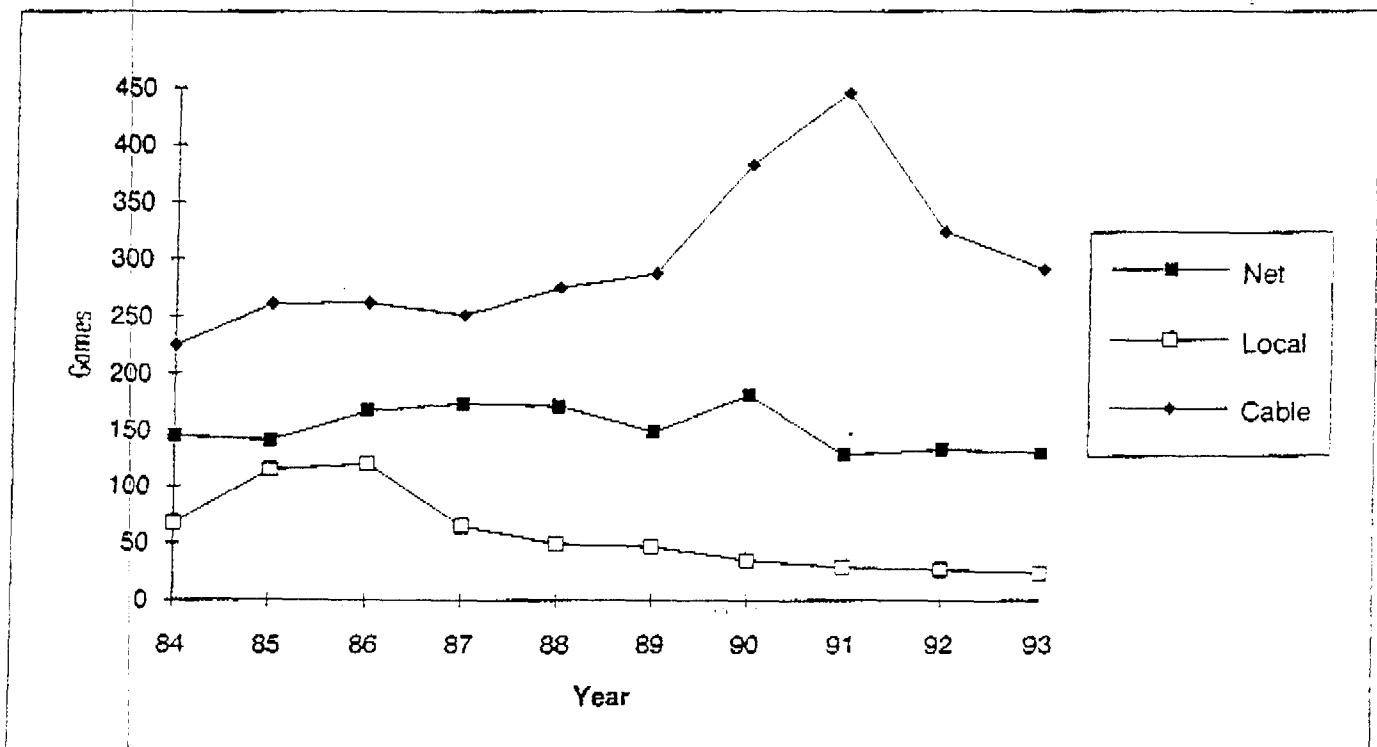


Dottie Fowler

EXHIBIT A

Summary (17 Markets)

Year	Net	Local	Cable	Bdcst	Total
84	146	68	225	214	439
85	142	115	261	257	518
86	167	120	262	287	549
87	173	65	251	238	489
88	171	49	274	220	494
89	148	47	287	195	482
90	180	35	382	215	597
91	128	29	445	157	602
92	133	27	323	160	483
93	129	24	290	153	443



PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO

I am employed in the State of California, County of San Bernardino. I am over the age of 18 years and am not a party to the within action; my business address is 2436 N. Euclid Avenue, Suite 5, Upland, California 91786.

On February 14, 1994 I served the foregoing documents(s) described as:

DECLARATIONS OF: DENNIS C. MUELLER, Ph.D.; HARRY J. PAPPAS; LeBON ABERCROMBIE; LISE MARKHAM AND APOSTOLOS SIGUOURAS AND EXHIBITS ATTACHED THERETO IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE DISMISSAL FILED BY DEFENDANTS THE PACIFIC-10 CONFERENCE; CAPTIAL CITIES/ABC, INC., ESPN, INC., ABC SPORTS, INC. AND PRIME TICKET NETWORK

on all interested parties by placing a true copy thereof in a sealed envelope addressed as follows:

Frank Hinman, Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, CA 94111

Steven M. McClean, Esq.
Thomas, Snell, Jamison, et al
P. O. Box 1461
Fresno, CA 93716

Timothy J. Buchanan, Esq.
Dietrich, Glasrud & Jones
5250 N. Palm Ave., Suite 402
Fresno, CA 93704

Randolph D. Moss, Esq.
Wilmer, Cutler & Pickering
2445 "M" St. NW
Washington D.C. 20037

(XX) BY MAIL. I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Upland, California.

() BY FACSIMILE

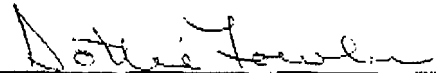
() BY PERSONAL SERVICE. I caused such envelope to be delivered

by hand to the offices of the addressee.

(XX) STATE. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(XX) FEDERAL. I declare that I am employed in the office of a member of the Bar of this court at whose discretion the service was made.

Dated this 14th day of February, 1994.

A handwritten signature in cursive script, reading "Dottie Fowler", is written over a horizontal line.

Dottie Fowler

1 GARY E. CRIPE, ESQ.
2 BAR #076154
3 CRIPE & GRAHAM
4 2436 N. Euclid Avenue
5 Suite 5
6 Upland, CA 91786

RECEIVED

MAY 31 1994

RECEIVED
OFFICE OF THE CLERK
U.S. DISTRICT COURT

ORIGINAL
FILED
FEB 14 1994

Attorneys for Plaintiff PAPPAS TELECASTING, INC.

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

12 PAPPAS TELECASTING, INC. a
13 California Corporation, and as
14 Public Trustee,

Plaintiff,

-vs-

16 PRIME TICKET NETWORK, a
17 California Limited
18 Partnership, CVN, INC., a
19 Corporation, The PACIFIC-10
20 CONFERENCE, a California non-
21 profit association, CAPITAL
22 CITIES/ABC, INC., a Delaware
23 Corporation, ESPN, INC., a
24 Corporation, ABC SPORTS, INC.,
a New York Corporation, and
DOES 1 through 20, inclusive,

Defendants.

CASE NO. CV-F-92-5589-OWW

DECLARATION OF GARY E.
CRIPE IN OPPOSITION TO THE
MOTIONS OF DEFENDANTS FOR
SUMMARY JUDGMENT AND/OR
DISMISSAL

DATE: March 7, 1994
TIME: 10:00 A.M.
ROOM: 2

I, Gary E. Cripe, declare and state:

1. I am a member in good standing of the State Bar of
California, and I am admitted to practice before this Court, and
I am a partner in Cripe & Graham, attorneys for plaintiff Pappas

1 Telecasting, Inc. ("Pappas"). I have personal knowledge of the
2 matters set forth below and, if called, I could and would
3 competently testify to each and every of them. This Declaration
4 is submitted in opposition to the Motion for Summary Judgment
5 filed by defendant Pacific-10 Conference ("PAC-10"), the
6 Motion(s) for Summary Judgment or in the Alternative Motion(s) to
7 Dismiss filed by defendants Capital Cities/ABC, Inc., ABC Sports,
8 Inc. ("ABC"), and ESPN, Inc., and the Motion to Dismiss or, in
9 the alternative, Motion(s) for Summary Judgment filed by Prime
10 Ticket Network ("PTN") and CVN, Inc. ("CVN").

11 2. Attached as Exhibit 1 is a true and correct copy of an
12 affidavit executed by Scott Johnson, Assistant Athletic Director
13 for nonparty Fresno State University on January 31, 1994 in
14 response to a Subpoena Duces Tecum served on Mr. Johnson and
15 Fresno State University by plaintiff's counsel, and a true and
16 correct copy of a document entitled "Non-network Television
17 Broadcasts During Calendar Year 1987", completed by Scott
18 Johnson.

19 3. Attached hereto as Exhibit 2 are true and correct copies
20 of a document entitled "Programming Log Non-network Television
21 Broadcasts during Calendar Year 1985" completed by Scott Johnson
22 and "Programming Log Non-network Television Broadcasts during
23 Calendar Year 1988" completed by Scott Johnson.

24 4. Attached hereto as Exhibit 3 is a true and correct copy
25 of a document entitled "Interim Report in the Matter of,
26 Implementation of Section 26 of the Cable Television Consumer
27 Protection and Competition Act of 1992, Inquiry to Sports
28 Programming Migration", PP Docket No. 93-21 before the Federal

1 Communications Commission, FCC 93-333; Adopted: June 24, 1993;
2 Released: July 1, 1993.

3 5. Attached hereto as Exhibit 4 is a true and correct copy
4 of Comments Of The Association of Independent Television
5 Stations, Inc. In the Matter of Implementation of Section 26 of
6 the Cable Television Consumer Protection and Competition Act of
7 1992, Inquiry into Sports Programming Migration", PP Docket No.
8 93-21 before the Federal Communications Commission, March 29,
9 1993.

10 6. Attached hereto as Exhibit 5 is a true and correct copy
11 of the Answer of Capital Cities/ABC, Inc. and ABC Sports, Inc. to
12 Plaintiff's First Amended Complaint on file herein.

13 7. Attached hereto as Exhibit 6 are certified copies of Ex-
14 parte Application for Temporary Restraining Order ("TRO"); Notice
15 of Motion and Motion for Preliminary Injunction; Memorandum of
16 Points and Authorities; Declarations and Exhibits in Support
17 Thereof (including Declarations of LeBon Aberbrombie
18 ("Abercrombie Dec. I"), Harry J. Pappas--("Pappas Dec. I") and
19 Lisé Markam (Markham Dec. I")) in the matter entitled Pappas
20 Telecasting, Inc., et al, plaintiffs v. SportsChannel America, et
21 al, defendants, Case No. CV-F-91-577 REC. I was attorney of
22 record for plaintiff in that matter. It was only after the
23 filing of the Complaint, the Ex-Parte Application for a "TRO" and
24 negotiations, on the date of the scheduled hearing, that this
25 litigation was resolved. As a result of the settlement reached
26 between the plaintiff and defendants, and after plaintiff had
27 incurred nearly \$45,000 in legal fees and expenses, defendants
28 agreed to allow plaintiff to televise, live, the FSU v. UOP game

1 on November 9, 1991 as to which defendant SportsChannel had
2 asserted selection priority (which it refused to waive) based
3 upon an exclusivity provision like those in issue in the instant
4 case. As a direct result of that litigation and the settlement
5 of it, plaintiff was able to televise a schedule of six FSU
6 football games including the FSU v. Cal State Fullerton game on
7 November 16, 1991, during the 1991 football season. The UOP game
8 and Cal State Fullerton games were substitutes for the WSU and
9 OSU games originally contracted for by plaintiff.

10 8. Attached hereto as Exhibit 7 are true and correct copies
11 of exerpts of the transcript of the Deposition of Thomas C.
12 Hansen and Exhibits 1, 2, 3 and 11 attached thereto taken in the
13 above captioned matter.

14 9. Attached hereto as Exhibit 8 are true and correct copies
15 of exerpts of the transcript of the Deposition of Jim Livengood
16 taken in the above captioned matter and Exhibit 8 attached
17 thereto.

18 10. Attached hereto as Exhibit 9 are true and correct
19 copies of exerpts of the transcript of the Deposition of Michael
20 David Corwin taken in the above captioned matter and Exhibit 4
21 thereto.

22 11. Attached hereto as Exhibit 10 are true and correct
23 copies of exerpts of the transcript of the Deposition of Hal E.
24 Cowan taken in the above captioned matter.

25 12. Attached hereto as Exhibit 11 are true and correct
26 copies of exerpts of the transcript of the Deposition of Dutch
27 Baughman and Exhibit 1 attached thereto.

28 13. Attached hereto as Exhibit 12 are true and correct

1 copies of exerpts of the transcript of the Deposition of Harold
2 C. Gibson, Jr. taken in the above captioned matter and Exhibit 11
3 attached thereto.

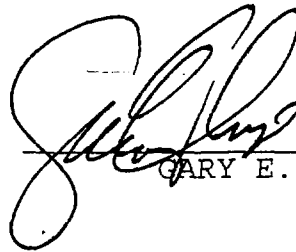
4 14. Attached hereto as Exhibit 13 are true and correct
5 copies of exerpts of the transcript of the Deposition of Scott
6 Johnson taken in the above captioned matter.

7 15. Attached hereto as Exhibit 14 are true and correct
8 copies of exerpts of the transcript of the Deposition of Janusz
9 A. Ordoover taken in the above captioned matter.

10 16. Attached hereto as Exhibit 15 are true and correct
11 copies of Results of Arbitron Coincidental Surveys produced by
12 plaintiff in response to a discovery request by PAC-10
13 Conference.

14 17. I declare under penalty of perjury that the foregoing
15 is true and correct. Executed under the laws of the State of
16 California on February 13, 1994, in Upland, California.

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GARY E. CRIPE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO

I am employed in the State of California, County of San Bernardino. I am over the age of 18 years and am not a party to the within action; my business address is 2436 N. Euclid Avenue, Suite 5, Upland, California 91786.

On February 14, 1994 I served the foregoing documents(s) described as:

DECLARATION OF GARY E. CRIPE IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT AND/OR DISMISSAL FILED BY DEFENDANTS

on all interested parties by placing a true copy thereof in a sealed envelope addressed as follows:

Frank Hinman, Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, CA 94111

Steven M. McClean, Esq.
Thomas, Snell, Jamison, et al
P. O. Box 1461
Fresno, CA 93716

Timothy J. Buchanan, Esq.
Dietrich, Glasrud & Jones
5250 N. Palm Ave., Suite 402
Fresno, CA 93704

--- Randolph D. Moss, Esq. ---
Wilmer, Cutler & Pickering
2445 "M" St. NW
Washington D.C. 20037

(XX) BY MAIL. I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Upland, California.

() BY FACSIMILE


() BY PERSONAL SERVICE. I caused such envelope to be delivered

by hand to the offices of the addressee.

(XX) STATE. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(XX) FEDERAL. I declare that I am employed in the office of a member of the Bar of this court at whose discretion the service was made.

Dated this 14th day of February, 1994.

A handwritten signature in cursive script, reading "Dottie Fowler", is written over a horizontal line.

Dottie Fowler

EXHIBIT 1

AFFIDAVIT OF SCOTT JOHNSON

Case Title: Pappas v. Prime Ticket et, al
Case No. CV-F-92-5589-OWW
United States District Court

Deponent: Scott Johnson

I, the undersigned, having the authority to certify the records declare the following: All non-privileged documents in my custody which are called for in the subpoena, as modified by the agreement set forth in the January 28, 1994 letter from Randall M. Penner to Gary E. Cripe, are attached hereto.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this 3/5th day of January, 1994, at Fresno, California.

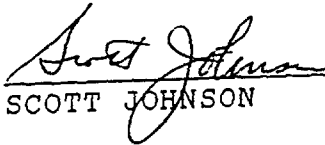

SCOTT JOHNSON

EXHIBIT 2

Nonnetwork Television Broadcasts
During Calendar Year 1985

___ Did not participate in any nonnetwork telecasts that were carried by a cable system(s) beyond the local service market.

___ Participated in the following telecasts that were carried by a cable system(s) beyond the local service market.

Sport	Home Team	Visiting Team	Telecast Date mo/day/yr	TV Station(s) Call Letters	Copyright Owner	Live or Delayed (L or D)	Telecast Fixed* (Y or N)
MBSKB	San Jose State	FSU	3 / 2 /85	KMPH-TV	PCAA	Live	Yes
"	FSU	UC Santa Barbara	3 / 7 /85	KMPH-TV	PCAA	"	"
"	FSU	CS Fullerton	3 / 8 /85	"	"	"	"
Football	FSU	Nevada-Las Vegas	9 /14 /85	KMPH-TV	FSU	Live	Yes
"	Oregon State	FSU	9 /21 /85	"	"	"	"
"	FSU	Hawaii	10 /5 /85	"	"	"	"
"	FSU	San Jose State	10 /12 /85	"	"	"	"
"	New Mexico State	FSU	10 /19 /85	"	"	"	"

Institution Fresno State Log Completed By Scott Johnson. SID

Please photocopy and use additional pages as necessary. Use additional space if necessary to list all stations.

*"Fixed" means all or parts of the telecast were recorded on film, videotape, replay tape or audiovisual logger by the station that produced the telecast.

Please return to: Cathy K. Bennett, Productions Coordinator, P. O. Box 1906, Mission, Kansas 66201.

During Calendar Year 1988

____ Did not participate in any nonnetwork telecasts that were carried by a cable system(s) beyond the local service market.

____ Participated in the following telecasts that were carried by a cable system(s) beyond the local service market.

____ Do not elect for NCAA to include this institution in claim for statutory royalty fees.

Sport	Home Team	Visiting Team	Telecast Date mo/day/yr	TV Station Call Letters*	Copyright Owner	Live or Delayed	Telecast Fixed** (Y or N)
Football	New Mexico	Fresno State	9 / 3 / 88	KMPH-TV	FSU	Live	Yes
otball	Colorado	Fresno State	9 / 10 / 88	KMPH-TV	FSU	Live	Yes
Football	Fresno State	New Mexico State	9 / 17 / 88	KMPH-TV	FSU	Live	Yes
Football	Oregon State	Fresno State	10 / 1 / 88	KMPH-TV	FSU	Live	Yes
Football	San Jose State	Fresno State	10 / 29 / 88	KMPH-TV	FSU	Live	Yes
Football	UNLV "	Fresno State "	11 / 12 / 88	KMPH-TV Prime TktCable	FSU BigWest	Live Live	Yes Yes
Football	Fresno State "	Long Beach State "	11 / 19 / 88	KMPH-TV Prime TktCable	FSU Big West	Live Live	Yes Yes

Institution Fresno State University

Log Completed By Scott Johnson, SID

Please photocopy and use additional pages as necessary. Use additional space if necessary to list all stations.

*We must have call letters of all stations to process a claim.

**"Fixed" means all or parts of the telecast were recorded on film, videotape, replay tape or audiovisual logger by the station that produced the telecast.

Please return to: Gina L. McNeal, Production Coordinator, P.O. Box 1906, Mission, Kansas 66201.

The National Collegiate Athletic Association
Mission, Kansas GLM:rie January 27, 1989

EXHIBIT 3

60. Another matter potentially related to the migration of college football from broadcast to cable television is the recent ABC pay-per-view experiment with Showtime Event Television. CapCities/ABC notes that for the 1992 season, it made regional college football games available on a pay-per-view basis in areas where such games would not otherwise be seen on broadcast television. CapCities/ABC argues that it endeavored to select the game for over-the-air broadcast that would have the greatest local appeal, and asserts that the intent of the pay-per-view plan was to broaden viewers' programming choices.¹³⁶ Viacom, the parent company of Showtime Event Television, submits that the arrangement will provide ABC a new revenue stream with which to produce additional packages of games. Viacom contends that participating schools also benefit from a new revenue stream, as well as from the opportunity to nurture relationships with geographically dispersed alumni.¹³⁷

61. Apart from the above two issues, it appears that there is limited concern that college football has migrated from broadcast to cable. Indeed, NCTA asserts that while national and regional cable networks cover a variety of college football events, the broadcast networks still dominate the major collegiate conferences, receive the first choice of nationally televised games and retain the rights to the major Bowl games. NCTA also argues that college football telecasts have increased in recent years. It submits that as individual schools began to negotiate their own rights contracts in 1984, sports syndicators and local broadcasters were flooded with available games.¹³⁸ Subsequently, NCTA asserts, because the large number of games on television was apparently reducing ticket sales and television ratings, the number of televised games in syndication declined from about 190 in 1984 to 100 in 1986 and 1987. Recently, however, NCTA submits, national broadcast coverage of college football has increased from 27 games in 1987 to 67 games in 1992, and national and regional cable coverage has increased from 54 games in 1987 to 192 in 1992.¹³⁹

62. Commenters also contend that cable coverage of college football games supplements broadcast coverage. For example, Big East states that it has sought cable carriage in areas where it has difficulty securing broadcast coverage, and that it gives priority to broadcast coverage of its "Game of the Week."¹⁴⁰ Viacom submits that its affiliate, Prime Sports, telecasts live Pac-10 games that are not part of the Pac-10 broadcast agreement and tape-delayed replays of other games. Prime Sports also offers a four-game

¹³⁶ CapCities/ABC Comments at 3-4.

¹³⁷ Viacom Comments at 3-4.

¹³⁸ In NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984), the United States Supreme Court invalidated the NCAA's football telecasting agreements on antitrust grounds.

¹³⁹ NCTA Comments at 20-22.

¹⁴⁰ Big East Comments at 5-6.

package of football games from the Big Sky Conference, which Viacom believes were not previously available on broadcast television.¹⁴¹ Southwest Conference notes that the television rights for games that are not covered by the CFA agreement are syndicated to broadcast stations and submits that those games are later tape-delayed on a cable sports network.¹⁴²

63. Data regarding national college football telecasts are attached in Appendix C, Charts 11 and 12. Chart 12 shows that 27 college football games were nationally broadcast in 1987 and that 67 games were nationally broadcast in 1992, an increase of 148 percent. During the same period, the number of games shown on national cable television increased from 54 to 192 (256 percent). We have not received sufficient information to compile a complete chart regarding local college football telecasts. While a few teams have submitted specific data regarding the number of games broadcast on local television stations, we do not believe that we can draw any conclusions from that sporadic information. It would be helpful if we were provided aggregate data for the major conferences. For example, we believe that the total number of and ratings for CFA games telecast by local broadcasters and cable operators would be probative as to the existence and likelihood of migration of games from broadcast to cable, as would data from other conferences such as the Pac-10 and Big 10.

3. College basketball

64. The promotion and regulation of college basketball is primarily governed by NCAA, which classifies member institutions as Division I, II or III. NCAA member institutions sponsor approximately 800 men's basketball teams and 800 women's basketball teams; there are currently 299 institutions in Division I, 220 in Division II and 313 in Division III. The college basketball event most widely televised and which generates the most public interest is the NCAA championship tournament for Division I men's basketball. The single-elimination tournament consists of 64 teams; 30 of the 64 berths are reserved for conference champions, and the rest are selected by invitation. Pursuant to NCAA's contract with CBS, the first two rounds of the tournament are broadcast regionally by local CBS affiliates and subsequent rounds are broadcast nationally on the network.¹⁴³

65. Because all the games of the NCAA men's basketball tournament are shown on broadcast television, it appears that there has been little or no migration of college basketball to cable. Indeed, some commenters contend that the NCAA tournament is an example of "reverse migration" in that early round games had previously been telecast on ESPN.¹⁴⁴ Commenters also argue that other college basketball events are primarily shown on broadcast

¹⁴¹ Viacom Comments at 8.

¹⁴² Southwest Conference Comments at 2-3.

¹⁴³ NCAA Comments at 8-11.

¹⁴⁴ See, e.g., NCAA Comments at 6; NCTA Comments at 22.

television. For example, Big East asserts that more of its games are currently carried on broadcast television than were carried five years ago. It submits that Big East men's basketball games are televised pursuant to a three-tiered distribution plan — (1) national and regional network telecasts on CBS; (2) some regular season games on ESPN; and (3) some regular season and post-season games available for distribution through the Big East Television Network, first to broadcast television and then to regional cable.¹⁴⁵ NCTA submits that the three broadcast networks maintain the first choice of basketball games involving the major college conferences in addition to the NCAA tournament.¹⁴⁶ Southwest Conference notes that its syndicator generally distributes weekend games to broadcast stations and weekday evening games to ESPN or a regional cable network.¹⁴⁷

66. Data regarding national college basketball telecasts are attached in Appendix C, Charts 13 and 14. We have not received sufficient information to compile a complete chart regarding local college basketball telecasts. As in the case of college football, we need additional data regarding the total number of and ratings for local broadcasts and cablecasts of the more widely popular college basketball teams. For example, aggregate data regarding local telecasts of NCAA Division I-A games outside of the NCAA Tournament would greatly facilitate our analysis.¹⁴⁸

G. Other Sports

67. The Notice invited commenters to address the telecasting of sports in addition to the four professional and two college sports that were the focus of our inquiry.¹⁴⁹ Cable and collegiate commenters submit that national and regional cable sports networks provide coverage of a wide variety of previously untelevised professional and amateur sporting events. Commenters specifically mention soccer, boxing, rodeo, golf, yacht racing, auto racing, lacrosse, volleyball, surfing, skiing, skating, bowling, tennis, horse racing, fishing and hunting, cycling, billiards, bodybuilding, women's basketball, smaller conference men's basketball and football, track and field, swimming and diving, wrestling, gymnastics, college baseball, college hockey, semi-professional hockey, softball, field hockey and various high

¹⁴⁵ Big East Comments at 2-5.

¹⁴⁶ NCTA Comments at 22-23.

¹⁴⁷ Southwest Conference Comments at 3-4.

¹⁴⁸ We note that the Big East Conference submitted data regarding Big East men's basketball games broadcast locally in 1987-88 and 1992-93. Big East submits that in 1987-88, 16 broadcast stations televised a total of 119 games, and in 1992-93, 15 stations televised a total of 146 games. Big East Comments at 4, Appendix A. It would be helpful to know the total number of Big East games played during those seasons.

¹⁴⁹ Notice at 1493.

school sports events.¹⁵⁰ In addition, commenters submit that cable networks present sporting news and commentary and other informational programs involving specific sports, fitness and outdoor activities.¹⁵¹ Further, NCTA notes that ESPN has covered special events such as the NFL draft, Baseball Hall of Fame inductions and spring training.¹⁵²

68. In addition, a number of commenters specifically mention the decline of professional boxing on broadcast television. CapCities/ABC agrees that boxing has essentially moved from broadcast to cable and other subscription services, but argues that boxing has a more specialized audience than the other sports listed in the Notice and that it does not have as extensive a history on broadcast television.¹⁵³ NCTA asserts that boxing was abandoned by broadcasters before the inception of cable networks, and argues that cable has brought regular coverage of boxing back to prime time.¹⁵⁴ Similarly, Time Warner submits that while CBS and NBC will not air any fights in 1993 and ABC is scheduled to air five, HBO, ESPN, Showtime and USA will collectively telecast more than 70 fights.¹⁵⁵ Similarly, Viacom asserts that boxing is televised nationally on Showtime, HBO, USA and ESPN and locally on regional cable networks such as MSG Network, Sportschannel America, Sportschannel and Prime Ticket. Viacom submits that "big event" fights, which its Showtime Event Television offers on a pay-per-view basis, were previously shown on closed circuit television for a fee in a theater or arena.¹⁵⁶

IV. PRECLUSIVE CONTRACTS

69. The 1992 Cable Act directs the Commission to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations."¹⁵⁷ The Act defines a "preclusive contract" as a contract that

¹⁵⁰ See ARC Comments at 12-16; ACC Comments at 3-4; Big East Comments at 5; MSG Comments at 21-22; NCTA Comments at 5; Southwest Conference Comments at 4; Time Warner Comments at 35-36; University of Pittsburgh Comments at 1-2; Viacom Comments at 9-10.

¹⁵¹ MSG Comments at 21; ARC Comments at 15-16.

¹⁵² NCTA Comments at 6.

¹⁵³ CapCities/ABC Comments at 3 n.4.

¹⁵⁴ NCTA Comments at 5.

¹⁵⁵ Time Warner Comments at 34-36.

¹⁵⁶ Viacom Comments at 4-6.

¹⁵⁷ 1992 Cable Act, Section 26(c) (1).

prohibits a local television station from presenting either a live local college event that is not carried live by any local cable system, or a tape-delayed local college event that is not carried, live or tape-delayed, by a local cable system.¹⁵⁸ We pointed out in the Notice that some contracts between collegiate athletic conferences and video programming vendors may effectively preclude local television stations from obtaining rights to broadcast local college football or basketball games not being telecast by the cable sports channel. The Notice requested information regarding contracts between college conferences and video programming vendors, including, if appropriate, the broadcast networks and individual broadcast stations. We also asked whether there is a significant connection between preclusive contracts and migration of games to cable, and sought comment on the economic and social consequences of preclusive contracts.¹⁵⁹

70. Commenters' arguments regarding preclusive contracts focus on college football. INTV and Pappas Broadcasting contend that the video distribution contracts between the college football conferences, including the CFA member conferences, and ABC, ESPN and regional cable sports networks, effectively preclude local broadcasters from carrying college football games of interest to their viewers. NAB and East Carolina University also suggest that preclusive contracts have prevented the broadcast of certain college football games.¹⁶⁰

71. The precise interplay between the various contracts is difficult to discern from the comments. In general, INTV submits that the major college football conferences, including the Big 10, Pac 10 and CFA, have entered into contracts with ABC and ESPN (which is owned by ABC) that reserve the most desirable time slots for ABC and ESPN telecasts and that prohibit conference members from televising games opposite ABC and ESPN telecasts. INTV contends that the net effect of these contracts is to prevent individual stations or groups of stations from contracting separately with individual schools to televise games of local or regional interest during the most popular Saturday afternoon viewing periods. Further, INTV argues, regional cable sports channels have made similar telecasting arrangements with various college athletic conferences. INTV notes that there are essentially two three-and-one-half hour windows for broadcasting games live on Saturday afternoons. It asserts that stations that are prevented from broadcasting games during those time periods by virtue of conference telecasting arrangements must convince the school to play the game during another time period, must show the game on a tape-delayed basis or must attempt to sublicense games from regional sports channels.¹⁶¹

¹⁵⁸ Id., Section 26(c) (2).

¹⁵⁹ Notice at 1497.

¹⁶⁰ See, INTV Comments at 6-17; INTV Reply at 9-24; Pappas Reply at 4-8; NAB Comments at 2-3; ECU Reply at 1.

¹⁶¹ INTV Comments at 7-9, 10 n.4.

72. Parties involved in exclusive contracts argue that they are not "preclusive" as defined by Section 26(c) (2), and that such contracts benefit all parties involved and the public. CapCities/ABC, CFA and ESPN submit that their football telecasting contracts are not preclusive because they permit broadcast stations serving the markets of the competing teams to televise games at any time, including during the exclusivity windows.¹⁶² INTV contends, however, that this home market exception is of no value in that ABC and ESPN may select which games to telecast as late as 12 days prior to the game. INTV argues that 12 days' notice is not sufficient for a local station to produce and market a game.¹⁶³ Parties supporting exclusivity also contend that sports exclusivity provisions are common, that they enable program producers to provide a unique product to advertisers and the public and that they promote program quality and diversity.¹⁶⁴ In this regard, CapCities/ABC argues that by increasing the value of its telecasts to advertisers, exclusivity provisions enhance its ability to compete against cable in bidding for rights to other sports events.¹⁶⁵

73. Further, CapCities/ABC contends that the term "video programming vendors" as used in the 1992 Cable Act refers to cable programming networks and not to broadcast networks. It submits that because all games televised pursuant to its contract with the CFA are shown on broadcast television, its contract cannot be said to constitute migration.¹⁶⁶ On the other hand, ARC asserts that the definition of video programming vendors should not be limited to cable networks. ARC contends that to the extent that broadcasters sell advertising and may negotiate for retransmission consent payments, they may be classified as video programming vendors for purposes of the statute. ARC argues that even if network broadcasters were outside the definition of video programming vendors, their contract practices are relevant to determining the reasonableness and competitive effects of cable networks' contract practices.¹⁶⁷

74. In order to properly carry out the directives of the statute, we believe it necessary to examine the contract practices of broadcasters as well as cable programmers. While CapCities/ABC is correct that the legislative history refers to "contracts between cable sports channels and

¹⁶² CapCities/ABC Comments at 11; CapCities/ABC Reply at 1-2; CFA Reply at 1; ESPN Comments at 11.

¹⁶³ INTV Reply at 14 n.20.

¹⁶⁴ See CapCities/ABC Comments at 11-12; ESPN Comments at 10-11; University of Pittsburgh Reply at 2.

¹⁶⁵ CapCities/ABC Comments at 12.

¹⁶⁶ CapCities/ABC Comments at 7-9; CapCities/ABC Reply at 1-2.

¹⁶⁷ ARC Comments at 11.

college athletic conferences,"¹⁶⁸ the statute refers to "video programming vendors" without further categorization. We conclude that the term "video programming vendor" refers to any provider of video programming, not just cable entities, and therefore includes a broadcast network such as ABC.¹⁶⁹ We further note that the record of this proceeding indicates that the contracts with which broadcasters primarily take issue are those between ABC and the various college football conferences, particularly CFA. Broadcasters are also concerned about contracts between college football conferences and ESPN, which is owned by CapCities/ABC. Because broadcasters argue that these contracts have "artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations,"¹⁷⁰ such contracts are directly relevant to our Congressionally mandated analysis of preclusive contracts and will be carefully evaluated.

75. At this point, we do not have sufficient information to make specific recommendations to Congress regarding the existence, prevalence and legality of preclusive contracts. We do believe, however, that the issue warrants further investigation, and we intend to include it in our forthcoming Further Notice of Inquiry. It would be helpful for commenters to diagram how the various contracts operate. For example, the exact times of the CFA/ABC and CFA/ESPN exclusive windows are not apparent, although it is clear that they apply during the afternoon and early evening hours on Saturdays. The specific teams and conferences involved in exclusive contracts are likewise not apparent, nor is it clear how often teams from different conferences play each other and how the various exclusive contracts operate when teams from different conferences play each other.

76. In addition, it would be helpful for broadcasters to discuss their difficulty in acquiring rights to home games of local college teams separately from their experiences in acquiring rights to other games.¹⁷¹ It appears that broadcasters are primarily concerned with the ability of ABC and ESPN to decide which games to telecast on 12 days' notice, which they argue effectively precludes them from broadcasting games of local teams. In informal discussion with Commission staff, proponents of the 12-day notice have argued that the arrangement provides ABC and ESPN with maximum flexibility to select the games and teams of most immediate interest, and

¹⁶⁸ See Committee on Energy and Commerce, U.S. House of Representatives, H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at 125-26 (House Report).

¹⁶⁹ We note that for purposes of Section 616 of the 1992 Cable Act, the term "video programming vendor" is defined as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. Section 536(b).

¹⁷⁰ 1992 Cable Act, Section 26(c) (1).

¹⁷¹ We note that there is dispute over what games should be considered "local." While the ABC and ESPN contracts define a local game as a home game involving a team whose school is based in the ADI of the broadcast station in question, INTV advocates a broader definition. See INTV Comments at 15-16.